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Supreme Court of the United States

TERM: A. D. 1949

No.....

LAWRENCE E. KELLY, Administrator of the Estate of H. M. KELLY, Deceased, and MOLLIE KELLY,
Petitioners,

v.

THE SHAMROCK OIL & GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The Petitioners, Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, deceased, and Mollie Kelly, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF MATTER INVOLVED

H. M. Kelly and Mollie Kelly, residents of Michigan, sold a section of land in Texas through an agent named Fowlston to the Shamrock Oil & Gas Corporation. The agent, Fowlston, lived in Texas near the land. (R. 148.) He represented the Kellys in the transaction in question and received from them a commission of $3,200.00 for his services. Unknown to the Kellys, Fowlston was also acting

as the agent of the Shamrock Oil & Gas Corporation. The Shamrock paid Fowlston a $500.00 commission for his services in the transaction. (R. 152, 153 and 157.) The Kellys did not know that Fowlston was acting as the agent of the Shamrock until after the sale was closed. (R. 108.) Kelly did not know that Shamrock was paying Fowlston a commission until after the sale was closed. (R. 107.) The Kellys had never seen the land. (R. 81.)

This suit was filed by H. M. Kelly and Mollie Kelly to rescind the deed conveying the land to the Shamrock. Plaintiffs based their suit upon two propositions: (1) that Fowlston, admittedly the seller's agent, was also acting as the agent of the purchaser unknown to the seller, and (2) various fraudulent representations which induced the sale. (R. 10, p. 6, et seq.) H. M. Kelly passed away pendente lite. His administrator was made a party Plaintiff.

A jury trial was requested and granted. The Trial Judge put the case to the jury solely on the fraudulent representations, and excluded the matter of dual agency unknown to the seller. The jury verdict was for the Shamrock. The Trial Judge made no findings of fact. The Court's charge is set out on pages 280 to 289 of the Record.

The Plaintiffs contend that Fowlston, the admitted agent of the Plaintiffs, was also acting as the agent of the Defendant purchaser unknown to the sellers. The Trial Judge refused to submit an instruction to the jury that if they found that Plaintiffs' agent, Fowlston, was also acting as the agent of the Defendant, Shamrock, unknown to Plaintiffs, the jury would find for the Plaintiffs. (R. 42,

Request No. 2 and R. 49, Request No. 10.) The Trial Judge did not believe that a dual agency situation unknown to the seller furnished grounds for rescinding the conveyance. He therefore refused the instructions requested by Plaintiffs on dual agency. The Fifth Circuit Court of Appeals held that the evidence raised an issue for the jury on dual agency, and that if Fowlston was acting as the agent of the Shamrock unknown to Kelly, the Plaintiffs were entitled to recover, but affirmed the case on the theory that the Trial Judge had instructed the jury on that very matter. The supporting brief shows that the jury were not given any instructions at all on "dual agency" unknown to one of the principals.

Circumstantial evidence was relied upon by the Plaintiffs to establish some phases of their case with reference to the fraudulent representations. The Trial Judge refused to instruct the jury on circumstantial evidence. (R. 38, Request 11.)

JURISDICTION

This Court has jurisdiction to grant a writ under Rule 38, Section 5, Sub-divisions (a) and (b) for these reasons:

(1) The Trial Judge put the case to the jury on fraudulent representations alone and excluded the issue of dual agency unknown to the seller in the face of the decision of this Court in *St. Paul, F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653*, holding that all issues must be submitted to the jury with appropriate instructions:

> "The fact that the defendant had incorporated errors of law in the instructions which it sought upon

the second defense did not justify putting the case to the jury solely upon the first."

(2) The Trial Judge refused to instruct the jury on circumstantial evidence in the face of this Court's opinion in *Rea v. Missouri, 21 L. Ed. 707*, holding that it was reversible error to refuse to charge on circumstantial evidence saying:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

The foregoing error was particularly aggravated in view of the fact that the Court instructed the jury that agency may be established by circumstances and thereby inferentially charged them that no other fact issue in the case could be proved by that character of evidence. (R. 283, top of page.)

QUESTIONS PRESENTED

(1) Can the Trial Court put this case to the jury on one phase of the Plaintiff's contentions (fraudulent representations) and refuse to give them proper instructions upon the law entitling the Plaintiffs to a verdict if the jury finds the existence of a dual agency unknown to the Plaintiff seller (Petition for Rehearing, pp. I, II, III and IV)? (2) When a portion of the Plaintiff's case stands on circumstantial evidence, is it error to refuse to give the jury a proper charge that any fact in issue may be proved by circumstantial evidence (Petition for Rehearing, p. VIII)?

REASONS RELIED UPON FOR WRIT

This case involves $65,000.00 or $70,000.00. Plaintiffs established a dual agency unknown to the seller. They were denied a verdict on that ground by the refusal of the Trial Court to charge on dual agency unknown to one of the principals. They have been denied their constitutional rights to have that issue passed upon by the jury. The Plaintiffs have not had a trial on dual agency. A motion for rehearing was overruled by the United States Court of Appeals for the Fifth Circuit on January 21, 1949. The Supreme Court is the only court with the power and authority to secure to these Petitioners their right to have that question of "dual agency" tried out in a court of justice in conformity with the laws of the land. The Fifth Circuit Court of Appeals wrote two opinions in this case holding that the Plaintiffs' theory on "dual agency" unknown to the Kellys had been fully submitted to the jury. Not a single one of those opinions points out a paragraph, sentence or phrase of the Court's charge that instructs the jury upon the law entitling the Plaintiffs to recover if they find a dual agency existed unknown to the Kellys. The reason that has not been done is that there is no such instruction in the Court's charge. *Please read the Respondent's reply to this application for a writ of certiorari and see if there is anything in that reply that points out any portion of the charge instructing the jury on the law entitling the Plaintiffs to a verdict if they find that a dual agency existed unknown to the Kellys.*

We sincerely recognize the fact that the Supreme Court of the United States is the most over-worked judicial tribunal in the world, but H. M. Kelly spent a lifetime in accumulating a portion of the proceeds of this litigation. It has been taken from him without due process of law. We earnestly urge your consideration of this application.

Respectfully submitted,

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Supreme Court of the United States

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No.....

LAWRENCE E. KELLY, Administrator of the Estate of H. M. KELLY, Deceased, and MOLLIE KELLY,
Petitioners,

v.

THE SHAMROCK OIL & GAS CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

THE OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit wrote two opinions in this case. Both opinions are reported in *171 Fed. (2d) page 909*. The opinions are also printed in full in the record. (R. 298 and R. 318.)

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U. S. C. 1254), and Rule 38, Section 5, Subdivisions A and B of the Rules of the Supreme Court of the United States. The Circuit Court of Appeals has erroneously decided questions of law in this

case that deprive the Petitioners of the right of a trial on issues of fact involving some $65,000.00 to $70,000.00 in controversy. The judgment denying a rehearing was entered January 21, 1949. (R. 318.)

STATEMENT OF THE CASE

The Petitioners, Plaintiffs in the trial court, contended that their agent, Fowlston, was also acting as the agent of the Shamrock Oil and Gas Corporation in the transaction which resulted in the sale of the Plaintiff's land to the Shamrock. The Defendant admitted that Fowlston was Kelly's agent. (R. 25, p. II.) On Pages 3 and 4 of the December 7, 1948, opinion, the Circuit Court holds that the evidence raised a question for the jury on whether or not Fowlston was also secretly acting as the agent of the Shamrock. (R. 300-301.) The law applicable to this case is stated as follows:

> "However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth—So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." *Olson v. Pettibone, 48 L. R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S. W. (2d) 585 (Texas Commission, p. 2); 2 A. J., Agency, Sec. 265; Newton v. Mann, 14[illegible] A. L. R. 76, pp. 6 and 7.*

"If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." *Restatement of the Law, Agency, Section 318.*

"And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." *Bass v. Tolbert, 112 S. W. 1078. (Texas C. C. A.)*

The Circuit Court of Appeals recognizes and holds that the foregoing is the Texas law. (Pages 3 and 4 of its opinion on December 7, 1948.) Your Petitioners requested two separate instructions on dual agency, both of which were refused. We requested this instruction:

"If you find by a preponderance of the evidence that the relation of principal and agent existed between C. J. Fowlston and the Shamrock Oil & Gas Corporation from January 20, 1941, to June 16, 1941, and if you further find from a preponderance of the evidence that H. M. Kelly did not know C. J. Fowlston was the agent of the Shamrock Oil & Gas Corporation you will return a verdict for the plaintiffs." (R. 42, Request No. 2.)

In a separate request, we also asked the trial court to give a broader charge on dual agency that plaintiffs were entitled to, but which the court refused, reading:

"You are instructed that if C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation during the negotiations leading up to the execution of the Deed, dated June 16, 1941, and that if you further find that H. M. Kelly did not know that C. J.

Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation, you will return a verdict for the plaintiffs, and this without reference to whether or not H. M. Kelly sustained any damages or injuries as a result of having made the trade with the Shamrock Oil & Gas Corporation.

"In this connection you are further instructed that it is not necessary that either Fowlston or the Shamrock Oil & Gas Corporation intended any fraud or intentional injury to H. M. Kelly, but that nevertheless, your verdict should be for the plaintiffs, if you find that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation in negotiating the purchase of Kelly's property, and if you further find that H. M. Kelly did not know that C. J. Fowlston was so acting." (R. 49, Request No. 10.)

ERRORS RELIED UPON

(1) The Circuit Court of Appeals erred in holding that the jury was fully instructed on the law of "dual agency" unknown to the seller and that Plaintiffs' requested instructions on that phase of the case were, therefore, properly refused.

(2) The Circuit Court of Appeals erred in holding that the trial court properly refused the instruction on circumstantial evidence. The foregoing errors were pointed out to the court in Paragraphs I, II, III, IV and VIII of the Petition for Rehearing.

FIRST QUESTION DISCUSSED

If the trial court did not give some kind of an instruction to the jury covering the Plaintiffs' theory that they were

entitled to recover if the jury found that Fowlston was acting in a dual capacity unknown to the Plaintiffs, then the trial court erred in refusing each of the foregoing requested instructions and the Circuit Court of Appeals should have reversed the case and sent it back for a new trial. For your convenience in determining whether or not the jury were instructed on the Plaintiffs' theory of recovery, we will number each paragraph and italicize the charge given by the court that you may readily distinguish between the charge given and our discussion of it. The charge begins on Page 280 of the Record and is as follows:

1.

"THE COURT: I give you the charge of the Court, it will be in the main, oral, so give attention that you may remember its provisions."

2.

"In this case, number 596 civil, styled Lawrence E. Kelly, Administrator, and others, v. Shamrock Oil & Gas Corporation, you are charged that the plaintiffs are the legal successors of H. M. Kelly, deceased."

3.

"That about the 24th of June, 1941, the said H. M. Kelly conveyed the surface and the greater portion of the minerals, as set forth in the pleading, under certain land in Moore County, Texas, which is described in the pleadings."

The foregoing paragraphs are preliminary in nature, and require no comment on this matter of whether or not

the trial court submitted the question of "dual agency unknown to Kelly" to the jury.

4.

"This suit is brought on the part of the plaintiffs to rescind that sale. As a basis for such the plaintiffs allege fraud on the part of their agent, the agent of H. M. Kelly, C. J. Fowlston, alleging that the said representative, or agent, Fowlston, pretended to his principal, H. M. Kelly, that the field in which his land was located was being depleted, and that the producing well thereon was sour gas and of smaller value; and that he concealed from his principle the facts, as alleged in his petition, to influence his principal to make this sale."

5.

"Now the defendant denies that they had any purpose in the reduction of the take to influence the action of the plaintiffs; the defendant denies that it was a party to any act to deceive or defraud or wrong the plaintiffs."

6.

"The burden of proof upon these issues is upon the plaintiff to establish his case by a preponderance of the evidence, which is the greater weight and degree of credible testimony. You are the judges of the weight of the testimony and of the credibility of the witnesses."

Paragraph 4 defines for the jury the basis of the plaintiffs' suit and enumerates what the court says are the plaintiffs' claim for relief. The court does not mention or even allude to the main theory upon which the plaintiffs presented this case to a court for determination of their rights; namely, that Fowlston was acting as the agent of Shamrock unknown to Kelly. The court's statement in

Paragraph 4 limits the plaintiffs' claim to *fraudulent representations* and impliedly excludes "dual agency unknown to Kelly." Paragraph 5 again charges the jury that the defendant denies the aforesaid specific acts of *fraudulent representation* and that defendant denies any part in any fraudulent or wrongful act. This paragraph again ignores and impliedly excludes from the consideration of the jury the question of "dual agency unknown to Kelly." Paragraph 6 simply places the burden of proof.

7.

"Now, applying these instructions you are instructed.

"If you find and believe, from a preponderance of the evidence, that the said C. J. Fowlston while acting as agent for H. M. Kelly, did, in conjunction with the defendant, Shamrock, and with the approval and connivance of the defendant, Shamrock, misrepresented to his principal the facts as alleged in the plaintiffs' petition and that the plaintiff relied upon those misrepresentations and was led to act upon them to his loss, then and in that event your verdict will be for the plaintiffs."

Paragraph 7 adverts again to the specific misrepresentations of fact. You will notice that even there, the court made a recovery dependent upon a further finding that the representations were made with the "approval and connivance" of the Shamrock and a "loss" to the Plaintiff. There is no allusion whatever to the plaintiffs' theory of "dual agency unknown to Kelly." "Loss" or "damage" is

not an element of the right to recover when a secret dual agency is shown.

8.

"Now, in connection with plaintiffs' case, there was offered a series of letters that passed between the plaintiff, deceased, H. M. Kelly, and his agent, Fowlston. The Court permitted these letters to be offered in evidence and to be read to you as evidence, but they may be considered by you only if you believe that Shamrock was also acting by and through the said Fowlston, or rather, that Fowlston was acting as an agent for Shamrock, as well as an agent for the deceased, Kelly. So, if the defendant, Shamrock, was not acting in a fraudulent way, then those letters would be merely hearsay. To explain—if two of you had a conversation in the absence of a third party, that party would not be bound by anything that passed between you, because you didn't hear it. Likewise, if two of you passed letters and the third person about whom, or concerning whom, the letters were written, did not know of their contents, and had not inspired their contents, when they would not be admissible against them, they would be hearsay. So, unless you find and believe that Fowlston was acting for Kelly, or was a party, or that Shamrock was a party to the fraud as charged, then these letters would not be admissible, and without such evidence the proof has failed as to fraud, and in the absence of fraud the defendant would recover."

Paragraph 8 simply charges the jury that the letters between Kelly and Fowlston would not be binding on the Shamrock and could not be considered as evidence against the Shamrock unless the jury found that Fowlston was also the agent of Shamrock. This paragraph deals with fraudulent representations of matters of fact. The court does not even intimate that the plaintiffs would be entitled

to recover if they found that Fowlston was also acting as the agent of Shamrock unknown to Kelly—a matter upon which plaintiffs were absolutely entitled to go to that jury with full instructions.

9.

"I give you certain charges requested by the plaintiff, and adopt them as a part of the law, which I will now read to you."

10.

"Fraud is an act or omission or concealment which involves a breach of legal duty toward confidence justly reposed and by which an undue or unconscionable advantage is taken of another."

These two paragraphs define fraud—not dual agency. Fraud is not dual agency. Fraud is not an element of dual agency. Fraud involves an *intent to deceive*—actual or constructive. The *intent to deceive* is not an element of the right to recover on a situation involving a dual agency unknown to one of the principals. *(Olson v. Pettibone, supra).*

11.

"I give you also the plaintiffs' requested instruction number nine:

"You are instructed that by agency is meant a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by

circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved."

12.

"You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter."

Paragraphs 11 and 12 define "agency" and "agent," but they do not tell the jury that the plaintiffs are entitled to recover if they find that Fowlston was acting as agent of Shamrock unknown to Kelly.

13.

"I give you also requested instructions three, and, four of the plaintiff. Number three: No, I have given you in substance number three in another charge, so I will pass to number four."

14.

"If you find, from a preponderance of the evidence, that the Shamrock Oil and Gas Corporation reduced the take on Kelly number one for the months of December, 1940, and January, February, March and May of 1941, and that it was a part of the scheme made and entered into for the purpose of inducing H. M. Kelly to sell the gas royalty under section 238 to the Shamrock Oil and Gas Corporation; and, if you further find that H. M. Kelly would not have sold the gas royalty under section 238 to the Shamrock Oil and Gas Corporation had the Shamrock Oil and Gas Corporation reduced the take of Kelly number one, for the months mentioned, then you may return a verdict for the plaintiffs."

Paragraphs 13 and 14 instruct the jury on the law on the reduction in the gas take, but erroneously instruct

them that they must find further that the reduction was a part of the scheme made and entered into between Fowlston and Shamrock before they can find for plaintiffs. There is no allusion of any kind in those paragraphs to the matter of dual agency unknown to Kelly.

15.

"In like manner, I give you certain charges requested by the defendant which are adopted by the Court as a part of the law of the case. This is defendant's requested charge number two.

"You are instructed that C. J. Fowlston is to be regarded as the agent of the Shamrock Oil and Gas Corporation only if the plaintiffs have proven, by a preponderance of the evidence, that Shamrock Oil and Gas Corporation employed Fowlston to act for it as its agent in the very matter in controversy, and unless the plaintiffs have so proven, by a preponderance of the evidence, your verdict will be for the defendant."

This is defendant's requested instruction on when Fowlston can be considered the *agent* of Shamrock. It does not mention "dual agency" or plaintiffs' right to recover if they find that Fowlston was Shamrock's agent unknown to Kelly. The instruction ties in and refers back to Paragraphs 8, 7 and 4. Paragraph 8 deals with the weight to be given the letters, if any. In Paragraph 8, the jury is charged that the letters cannot be considered against the Shamrock unless they find an *agency* relationship between Shamrock and Fowlston. Paragraph 15 does not tell the jury they will find for plaintiff if they find a dual agency existed. On the contrary, it charges the jury that in no event can they find for plaintiff unless they first find that

Fowlston acted as the agent of Shamrock in making the *fraudulent misrepresentations* in question. The plaintiffs' recovery is made to depend upon the making of fraudulent representations of fact and not upon "dual agency unknown to Kelly." These plaintiffs were entitled to recover without reference to whether or not any fraudulent representations were made of any kind or character, provided, and provided only, that the jury should find that Fowlston was Shamrock's agent, and that Kelly did not know Fowlston was Shamrock's agent. Dual agency alone, unknown to Kelly, entitled plaintiffs to recover. Paragraph 15 refers back to Paragraph 4 and to specific misrepresentations of fact. There is no allusion to plaintiffs' right to recover on dual agency unknown to Kelly. Furthermore, the Court then proceeds to tell the jury to take the charge as a whole and the instructions together. This is his charge:

> "You are instructed to take the court's charge as a whole, and to remember to view the instructions as a whole, and not to 'hang your hat' as it were upon one paragraph only, but take the instructions together."

You cannot take those instructions separately or together and find in them a charge that the jury shall return a verdict for plaintiffs if they find from a preponderance of the evidence that Fowlston was acting as the agent of Shamrock unknown to Kelly. The Circuit Court says, "Also the requested charges to the effect that the mere receipt by Fowlston of money from both parties unknown to plaintiffs would invalidate the transaction whether or not Shamrock colluded with Fowlston or employed him to act

for it were properly denied." The Court is mistaken. We did not request the Court to give that kind of an instruction. We requested the trial court to charge the jury that if they found that Fowlston was acting as the agent of Shamrock unknown to Kelly, they would return a verdict for the plaintiffs. (R. 42, Request No. 2.)

16.

"I give you also requested instruction number seven, on the subject: You are instructed that Fowlston could become Shamrock's agent only if Shamrock employed him to act for it. You are further instructed that there was no impropriety in the issuance of the five hundred dollar check to Fowlston, if, as it states, it was a commission check that Shamrock's office General Manager, J. H. Dunn, authorized, the same not being for any service performed by Fowlston for it, Shamrock, but upon the good faith assumption, however mistaken, that Kelly's sale had been a sale at a net price, and it was Shamrock's obligation to pay a reasonable commission to Kelly's agent; and in such event, Fowlston, if not previously employed by Shamrock to act, did not become Shamrock's agent merely because of the issuance of the five hundred dollar check."

This paragraph charges affirmatively on one phase of *defendant's* theory, but completely ignores plaintiff's right to recover if the jury finds a dual agency unknown to Kelly. That portion of the charge in Paragraph 16 reading: "You are further instructed that there was no impropriety in the issuance of the five hundred dollar check to Fowiston, if, as it states, it was a commission check that Shamrock's office General Manager, J. H. Dunn, authorized, the same not being for any service performed by Fowl-

ston for it, Shamrock * * *," does not present plaintiffs' theory of recovery on dual agency. The impropriety or propriety of the issuance of the five hundred dollar check to Fowlston is evidentiary on the question of whether or not Fowlston was Shamrock's agent, but the propriety or impropriety of the issuance of the check has nothing whatever to do with plaintiffs' right to recover if in truth and fact Fowlston was Shamrock's agent unknown to Kelly. The remainder of that paragraph simply tells the jury that the payment of the commission check standing alone under the circumstances therein referred to would not make Fowlston the Shamrock's agent in and by themselves. That paragraph does not tell the jury that they shall find for plaintiff if a dual agency existed, but simply tells them they cannot consider the payment of the commission check *as evidence of agency* if they find that the check was issued under the circumstances asserted by the defendant. You have not yet found an instruction in the trial court's charge that told the jury, by implication, reference or allusion, that they should find for plaintiffs if in fact a dual agency existed unknown to Kelly.

17.

"Again I give you, in part, number eighteen:

"If you find, from a preponderance of the evidence, that H. M. Kelly, prior to the time of the execution and delivery of the deed in question covering section 238, mentioned in the testimony, made an independent investigation concerning the gas well located on said section, and that he relied on his independent investigation thereof, then plaintiff cannot recover against the defendant."

This paragraph deals with independent investigation and it makes no allusion to dual agency.

18.

"I also give you charge number seventeen: You are instructed under the circumstances in this case, that no duty rested upon the defendant, Shamrock Oil and Gas Corporation, to notify H. M. Kelly when the well in question was reclassified from a sour well to a sweet well, in December, 1940, and its failure to do so cannot be considered by you for any purpose."

Comment by us on this is unnecessary.

19.

"You are further instructed that the reduction in 'takes' of gas from the gas well in question, after the same was classified as a sweet gas well by the Railroad Commission of Texas, cannot be considered by you as evidence tending to establish any fraud or collusion on the part of the Shamrock Oil and Gas Corporation, or any evidence of employment by the defendant, the Shamrock Oil and Gas Corporation, of C. J. Fowlston, as an agent of the defendant, unless you first find, from the preponderance of the evidence, that at the time of the reduction in takes from said well, that the defendant, Shamrock Oil and Gas Corporation, had entered into a conspiracy with the said C. J. Fowlston to fraudulently misrepresent said well and the quality of the gas being purchased therefrom, to said Kelly, and unless you still further find that the said Fowlston did fraudulenly misrepresent said well and its quality of gas to said Kelly and the said Kelly did rely thereupon."

This is a return to the defendant's theory of a reduction in the gas take. The last three paragraphs affirmatively set out separate theories of the defense, but not once do we see a charge even hinting at plaintiffs' theory that they

were entitled to recover upon dual agency unknown to Kelly if that situation in fact existed—which theory the Circuit Court held to be sound law.

20.

"You are instructed to take the Court's charge as a whole, and remember to view the instructions as a whole, and not 'hang your hat' as it were, upon one paragraph only, but take the instructions together."

The jury was plainly told that they must take each paragraph and each instruction together as a whole and when they got through doing that they were left without a single thread of thought upon which to base a verdict for the plaintiffs even if they found beyond a reasonable doubt that Fowlston was acting as the agent of Shamrock unknown to Kelly.

21.

"We have rendered judgment in favor of the defendant Price. He bought the surface from the Shamrock, so Price is out of the case and you will not dispose of him in your verdict."

22.

"I give you the effect of your findings, in the light of the pleadings. A verdict for the defendant means that the plaintiff cannot recover—that the plaintiff will take nothing. A verdict for the plaintiff means the rescission of the sale, or, means that the minerals conveyed will be restored, it means that the surface, although sold, the value of it will be returned to the former owner in the form of a judgment. So it will be your duty, if you find for the plaintiff, to determine the value of the land. Now you may in your minds, and in your discussion, become confused as to what will become of the moneys that have been col-

lected that would have been royalty since this deed was made. Do not let that enter into your consideration. You may also be confused, in the event there is a decision, what will become of the money that was paid. Do not enter into that, the Court will see to an equitable adjustment of these funds."

23.

"The things that are submitted to you is whether or not there shall be a rescission of the sale, and the value of the land. The form of your verdict will be like this; if you find for the defendant you simply say so, and that will be all the findings; if you find for the plaintiff then your verdict will be in form and substance like this, and the clerk will furnish you the form which will be helpful to you, 'We find for the plaintiff a rescission of the sale, and find the value of the surface conveyed to Price to be $,' signing same by your foreman.

"Any exceptions on the part of the plaintiff.

"MR. SMITH: Your Honor indicated he would give our 1-c, I am wondering if the Court overlooked it."

There isn't a word yet about dual agency unknown to Kelly.

24.

"Yes, I give you the further instruction, now the evidence disclosed, and it is admitted in this case, that C. J. Fowlston was the agent of H. M. Kelly for the purpose of negotiating the sale involved in this suit. You are instructed that H. M. Kelly had a legal right to rely upon the representations and statements of C. J. Fowlston and that no duty devolved upon him to make an investigation concerning the truth or falsity of his statements, and I use these words, the said Fowlston must have been acting in a dual capacity before the same will be considered as support of, or

authorizing a verdict for the defendant; in other words, Fowlston must have been fraudulently representing the plaintiffs."

This paragraph deals with Kelly's right to rely upon Fowlston's representations of fact without making an investigation. The charge deals with Kelly's right to rely upon the active fraud of Fowlston *by positive assertions of false statements.* There isn't a word in it about dual agency unknown to Kelly and the plaintiffs' right to recover if the jury found that Fowlston was in fact Shamrock's agent unknown to Kelly.

The remainder of the charge constitutes a colloquy between the court and counsel, but we desire specifically to call your attention to the fact that the plaintiff was accorded a bill upon the Court's refusal to give the instructions requested. Counsel for the Plaintiff stated in the presence of the jury and before they had retired, "And, Your Honor, of course, I suppose we have a bill on the Court's overruling of those other requested instructions?" To which the Court answered, "That goes as a matter of course." (R. 289.)

We have demonstrated that plaintiff asked for a proper instruction on dual agency and that the Court refused it. We have shown that the Court did not instruct the jury on dual agency. Even if our requests had not been correct that would not have justified the trial court in failing to submit the question of dual agency to the jury:

"The fact that the defendant had incorporated errors of law in the instructions which it sought upon

the second defense did not justify putting the case to the jury solely upon the first." *St. Paul F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653.*

The trial court put this case to the jury solely upon active fraud by fraudulent representation and *excluded* dual agency. The Plaintiffs have been deprived of their right to have the jury pass upon this question: Was Fowlston acting as an agent of Shamrock unknown to Kelly? If he was, it having been admitted that Fowlston was Kelly's agent, the Plaintiffs were entitled to recover.

It cannot be assumed that the jury passed upon the question of dual agency adversely to Appellant.:

> "* * * it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do." *Judge Yankwich in 3 F. R. D. 118.*

All of the fact issues must be submitted to the jury with an exposition of the law that will enable them to reach a proper verdict upon the facts they find to exist.

> "Such an exposition of law, in order to attain its statutory purpose, should be clear, concise, definite, positive, direct and accurate. It should be as comprehensive as the issues of the case are numerous and as broad as the evidence; but it should not go beyond those limits." *Judge Seth Thomas in 1 F. R. D. 141.*

SECOND QUESTION DISCUSSED

Plaintiffs requested the Trial Court to instruct the jury that "you are instructed that any fact may be proved by circumstances as well as direct evidence." (R. 38, Request No. 1.) The request was refused. As an illustration of

the need for a charge on circumstantial evidence, Plaintiffs alleged that the Defendant was operating a gas well on the land in question. Plaintiffs further alleged that the Defendant fraudulently reduced the monthly "take" from the well for the purpose of deceiving Plaintiffs into believing that the well was rapidly depleting; that the fraudulent reduction in the gas take had the desired effect; and that Plaintiffs would not have sold the land but for the reduction in the take. (R. 12, et seq.)

The average monthly gas take from Kelly No. 1 for the five months preceding December, 1940, was 84,410,000 cubic feet. The average monthly allowable for that five months period was 85,358,000 cubic feet. (R. 169.) The royalty check for December, 1940, was mailed out about January 20, 1941. (R. 184.) Fowlston's letter opening negotiations was mailed on January 20, 1941. (Exhibits Page 32.) The average monthly gas take from Kelly No. 1 during the period of negotiations (some seven months) was 37,978,000 cubic feet—a 7/8rds reduction in the monthly take with the exception of the month of April, 1941. The average monthly allowable for those seven months was 258,278,000 cubic feet. (R. 169-170.) The deal was closed in June, 1941. (Exhibits Page 87.) The average monthly take from Kelly No. 1 for the succeeding six months was 251,161,000 cubic feet. (R. 110 to 121.) The average monthly allowable for that six months period was actually less than it had been for the six months during the negotiations—250,110,000. (R. 110 to 121.) The royalties paid Kelly were reduced accordingly. (Exhibits Page 91.)

The gas was sweet. It could be used for light and fuel purposes. (R. 175.) Kelly No. 1 was connected to the Defendant's McKee plant at all times. An analysis of the McKee plant operations report filed with the Railroad Commission shows that Shamrock had a market for the full allowable from Kelly No. 1 at all times during the negotiations. (Exhibits CC through PP, pages 128 through 157.) As an illustration, we take the month of January, 1941, shown as Plaintiff's Exhibits EE, pages 132-133: Daily intake 214,329,000 cubic feet; Plant used residue daily 8,602,000 cubic feet; leases used 142,000 cubic feet daily. Total legitimate sweet gas uses: 8,602,000 plus 142,000 equals 8,744,000 cubic feet daily. Gas taken daily from the two sweet gas wells was 3,686,000 cubic feet. The Shamrock therefore had an additional use or market for 8,744,000 minus 3,686,000 equals 5,058,000 cubic feet daily. That market was not supplied until it began to take the full allowable from Kelly No. 1 in July, 1941.

It should be noted that the J. B. Schlee well with an allowable of ⅓ that of Kelly No. 1 was the only other sweet gas well connected to the McKee plant during the negotiations. Although the allowable from the Schlee well was slightly less than ⅓ that of the Kelly well, the Shamrock continued to take almost 3 times the amount of gas from the Schlee well that it took from the Kelly well during the negotiations. (Exhibits P through V, pages 96 to 109.) It should be noted further that the take from the Schlee well was not decreased when the Shamrock started taking the

full allowable from Kelly No. 1 in July, 1941. (Exhibits W through M, Pages 110-119.)

Kelly testified that the reduction in the gas take from the well influenced his decision to sell and that if the reduction had not been made he would not have sold the land at all. (R. 117.)

In *Rea v. Missouri, 21 L. Ed. 707*, you reversed a lower court because it failed to charge on circumstantial evidence, saying:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced."

The refusal to charge on circumstantial evidence is aggravated by the fact that the Court instructed the jury that "agency" could be proved by that character of evidence and thereby impliedly charged them that no other fact could be proved by circumstantial evidence.

This record shows that the jury was not able to reach a verdict until after the Court's charge had been written up and delivered to the jury on its request. (R. 291.) The record shows that the jury followed the charge; that they were not authorized to consider "dual agency" as a basis for a verdict for the Plaintiffs nor take into consideration circumstantial evidence.

CONCLUSION

The law gives these Petitioners a right to recover their land in this case if it is a fact that Fowlston was acting as the agent of the Shamrock unknown to the Plaintiffs. The Plaintiffs are entitled to go to a jury on that fact issue

with proper instructions from the court on the law. They have been denied that right. No one has ever pointed out a single paragraph, sentence or phrase in the Court's charge that instructs or purports to instruct the jury on the law with reference to "dual agency" unknown to one of the principals. The Circuit Court of Appeals did not do that in their opinion. Surely, if the Court instructed the jury on the law of "dual agency", counsel for the Respondent can point it out to you in its reply to this Petition for a Writ of Certiorari. It will not be done, because it is not in the charge.

WHEREFORE, Petitioners pray that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and that this cause be reversed with instructions to the Trial Court to submit the case to the jury with appropriate instructions on dual agency and circumstantial evidence.

Respectfully submitted,

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Detroit, Michigan,
Attorney for Petitioners.

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Supreme Court of the United States

TERM: A. D. 1949

No. 719

Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, Deceased, and Mollie Kelly,
Petitioners,

v.

The Shamrock Oil & Gas Corporation
Respondent.

PETITIONERS' ANSWER TO RESPONDENT'S REPLY ON PETITION FOR WRIT OF CERTIORARI

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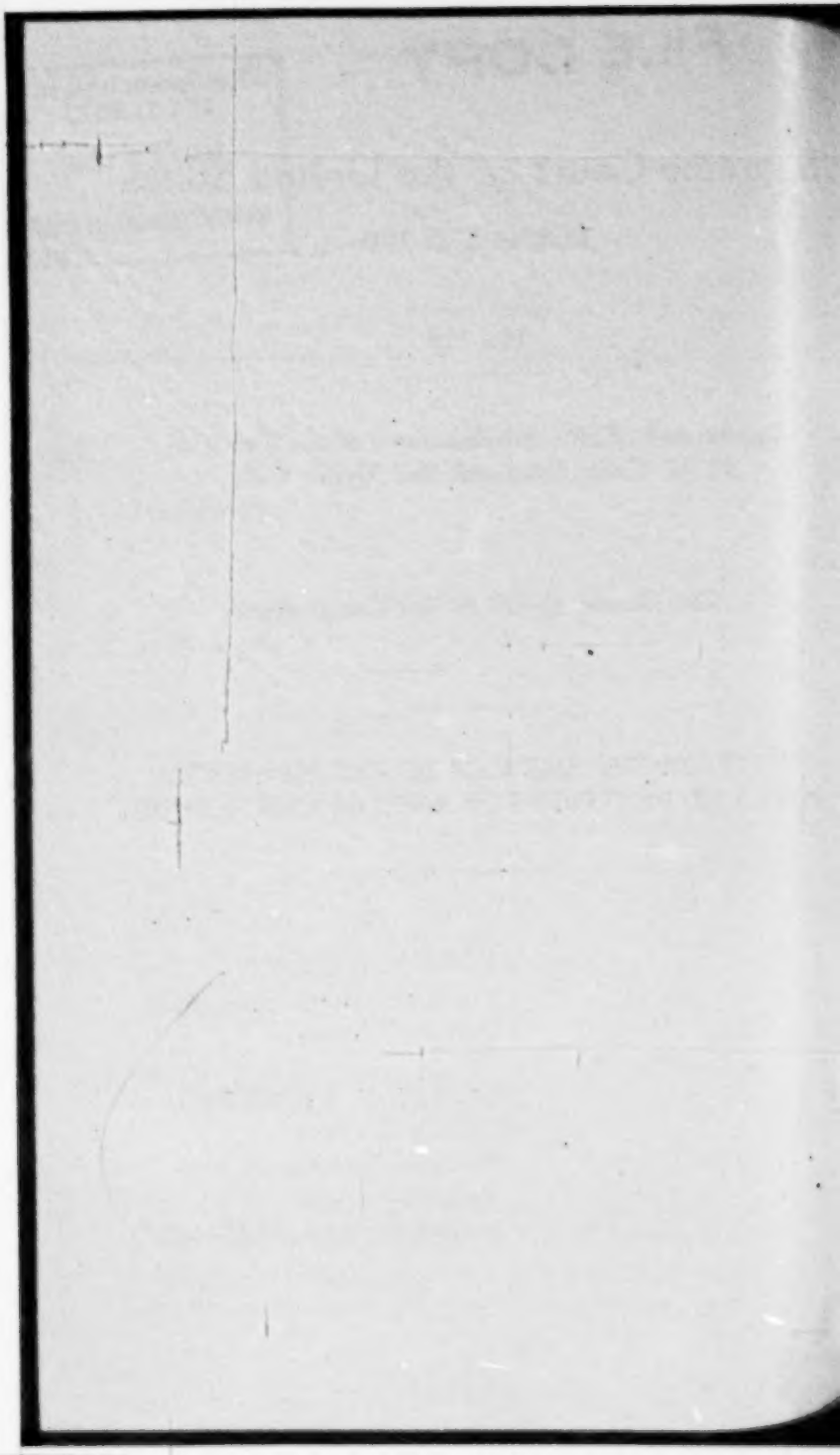

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MAY IT PLEASE THE COURT:

The Respondent's reply on Petitioners' application for writ of certiorari ignores two holdings of the Circuit Court in this very case by which Respondent is bound: (1) The evidence did raise the issue of a "dual agency" unknown to the seller, H. M. Kelly; and (2) it is the law of Texas that if a "dual agency" is found to have existed unknown to one of the principals, that principal is entitled to recind the transaction (Circuit Court Opinion, R. 298-299 and 313-314).

"However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth —So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." Olson v. Pettibone, 48 A.L.R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S.W. 2d 585 (Texas Commission, Pgh. 2); 2 A.J., Agency, Sec. 265; Newton v. Mann, 147 A.L.R. 769, Pghs. 6 and 7.

"If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." Restatement of the Law, Agency, Section 313.

"And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." Bass v. Tolbert, 112 S. W. 1078 (Texas C.C.A.).

The Shamrock admits that Fowlston was the trusted agent of H. M. Kelly upon whom Kelly had relied for a number of years (R. 25, Pgh. IIB). Kelly paid Fowlston a $3,200 commission on the deal (R. 197 and Exhibits Pages 83 and 85). J. H. Dunn, vice president of the Shamrock, testified that he knew Fowlston had been looking after some matters for Kelly (R. 150); and that Shamrock paid Fowlston a $500 commission on the deal, saying:

Q. What did the $500 represent?

A. It represented a commission.

Q. A commission?

A. Yes, sir (R. 152-153).

Q. (Interrupting) For his services in negotiating the Kelly deal?

A. Yes, sir (R. 153).

Q. Now, the plaintiffs' Exhibit No. 1, is this the $500 check which you spoke of on last Saturday as having issued to Mr. Fowlston for the commission in the acquisition of the title to 238, Moore County, Texas?

A. It is, yes, sir (R. 153).

Q. The commission which you paid Mr. Fowlston of $500, was that the only commission you ever paid him?

A. You mean in connection with this transaction?

Q. Any transaction.

A. **Oh, no, we have paid him other commissions. He has performed some other services at times, but I don't recall specifically (R. 157).**

The $500.00 commission check and voucher showing that it was a commission are shown as plaintiffs' exhibits "F," "G" and "H," pages 26, 27 and 28, of the Original Exhibits. The expense check and voucher showing Fowlston was Shamrock's agent are shown as plaintiffs' exhibits "H," "I" and "J," pages 28, 29 and 30 of the Original Exhibits. This deal was handled by J. H. Dunn (R. 243-244) and he directed the issuance of those checks (R. same).

Realizing, finally, the predicament in which the truth had placed the Shamrock, Dunn testified that "the commission was paid for Mr. Kelly * * * " (R. 228). He never did deny that the $500 check was a "commission" check. Instead he said that "any commission paid to Mr. Fowlston would have to be added to our cost of the property" (R. 224). Kelly did not know Fowlston was the agent of Shamrock (R. 108) or that Shamrock was paying Fowlston a commission (R. 107). On February 21, 1941, Kelly wrote Fowlston as follows:

"Does this mean $14,400.00 to me net, or in other words, will they take care of any fee which you might request for bringing us together * * * ? * * * **Have**

them write me just what they are willing to do and the amount of money that they are **willing to pay,** and I will give further consideration to the proposition, and if I am in the mood that I am in now I will be inclined to accept it, provided it meets with the conditions herein enumerated" (Exhibits Page 55, Fifth Pgh.).

The letter was shown to Shamrock and the request ignored (R. 250). Receiving no reply, Kelly wrote Shamrock direct on March 5, 1941, as follows:

"If you have an offer at your command, please be kind enough to advise me just what parties are interested in the oil or gas situation of this section" (Exhibits Page 58, Fourth Pgh.).

Shamrock did not answer that letter. It did not tell Kelly that it would pay the commission. It did not tell Kelly that the price to him would be net. Nor did Fowlston do so (R. 250 and 107).

Fowlston wrote Kelly exactly ten letters between February 21, 1941, and the closing of the deal, and not once did he mention a **net deal** or that Shamrock was paying him a commission (Original Exhibits Pages 57, 59, 63, 64, 69, 72, 73, 77, 78, 79). The memo of May 3d, 1941, shows that the full purchase price was to be sent to H. M. Kelly and that Kelly was to pay Fowlston his commission (Original Exhibits Page 158). The letter to the bank enclosing the deed to Shamrock and a draft for the purchase price states that Fowlston had been acting as the agent of Kelly and that the full purchase price is to

be sent to Kelly. Shamrock undoubtedly saw that letter when it paid the draft.

We asked Respondent to point out to you any portion of the Trial Court's charge submitting the Plaintiffs' theory of "dual agency unknown to the seller" to the jury. The Respondent now says that Plaintiffs' theory was submitted to the jury in this instruction:

> "I give you also the plaintiffs' Requested Instruction Number Nine:
>
> "You are instructed that by agency is meant, a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved.
>
> "You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter." (R. pp. 282, 283).

There isn't a line or word in that instruction about "dual agency." The Defendant admitted that Fowlston was Kelly's agent. One element of the Plaintiffs' right to recover having been admitted, the Plaintiffs therefore requested these instructions:

> "If you find by a preponderance of the evidence that the relation of principal and agent existed between C. J. Fowlston and the Shamrock Oil & Gas Corporation from January 20, 1941, to June 16, 1941, and if you further find from a preponderance of the evidence that H. M. Kelly did not know C. J. Fowlston was the agent of the Shamrock Oil & Gas Corporation you will return a verdict for the plaintiffs." (R. 42, Request No. 2).

In a separate request, we also asked the trial court to give a broader charge on dual agency that plaintiffs were entitled to, but which the court refused, reading:

> "You are instructed that if C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation during the negotiations leading up to the execution of the Deed, dated June 16, 1941, and that if you further find that H. M. Kelly did not know that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation, you will return a verdict for the plaintiffs, and this without reference to whether or not H. M. Kelly sustained any damages or injuries as a result of having made the trade with the Shamrock Oil & Gas Corporation.

"In this connection you are further instructed that it is not necessary that either Fowlston or Shamrock Oil & Gas Corporation intended any fraud or intentional injury to H. M. Kelly, but that nevertheless, your verdict should be for the plaintiffs, if you find that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation in negotiating the purchase of Kelly's property, and if you further find that H. M. Kelly did not know that C. J. Fowlston was so acting." (R. 49, Request No. 10).

Both of the requested instructions were refused (R. 42 and 49). Obviously, the instruction pointed out by Respondent as submitting the Plaintiffs' theory on "dual agency" does not touch that proposition. It bears particularly on the establishment of simple agency. It does not touch the Plaintiffs right to recover if the jury found that Fowlston was acting as the agent of the Shamrock unknown to Kelly, the seller.

The principle of estoppel urged by Respondent has no application. **That matter was not plead as a defense in the trial court. It was not submitted to the jury.** The record shows or at least raises an issue as the Circuit Court of Appeals held that Fowlston was acting as the agent of the Shamrock unknown to Kelly. That fact, coupled with the Defendant's admission that Fowlston was Kelly's agent, entitled Plaintiffs to a judgment. The Circuit Court so held. Plaintiffs were entitled to an instruction on dual agency unknown to the seller, because without it the jury could not and did not pass upon the main issue in the case.

The Respondent asserts that Kelly ratified the "dual agency" and that he failed to file a suit to cancel within a reasonable time (Pages 16 and 17 of Respondent's Reply to Petition for Writ of Certiorari). The Defendant did not plead ratification (R. 24-27). No such issue was submitted to the jury. H. M. Kelly testified without contradiction of any kind or character that he did not learn about the "dual agency" until his son returned from Texas less than a month before this suit was filed (R. 108). The four-year Statute of Limitations govern these actions in Texas. The defendant did not plead that the suit was not filed within a reasonable time, did not plead laches, or limitation, and no such issues went to the jury. In fact, the matter is raised in this court for the first time.

The Respondent asserts that Petitioners did not complain of the Court's charge in the Trial Court. We requested the issues set out before and the court refused them. Judge Hand expressed the law on that subject thus:

> "The request for further instruction was in substance equivalent to an objection to the charge * * * no objection could be plainer than the request for an instruction diametrically opposed to the one given in the court's charge." Wright v. Farm Journal, 158 F. 2d 978, (Pghs. 2-5).

With reference to the court's refusal of petitioners' requested instruction on circumstantial evidence, the Respondent points out that the court charged the jury that:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct

with reference to the subject matter involved." (R. p. 283).

The instruction given actually aggravated the error in refusing to charge generally on circumstantial evidence for these reasons: The Petitioners sought to set aside the deed for these reasons: (1) dual agency unknown to seller; (2) certain fraudulent representations; and (3) a fraudulent reduction in the gas take from the well on the land immediately preceding the opening of negotiations and continuing until the deal was closed. By charging that "agency" could be proved by circumstantial evidence, the court inferentially instructed the jury that no other issue in the case could be proved by that character of evidence. The average monthly gas take from Kelly No. 1 for the five months **preceding** December 1940, was 84,410,000 cubic feet. The average monthly allowable for that five months period was 85,358,000 cubic feet (R. 169). The royalty check for December, 1940, was mailed out about January 20, 1941 (R. 184). Fowlston's letter opening negotiations was mailed on January 20, 1941 (Exhibits Page 32). The average monthly gas take from Kelly No. 1 **during the period of negotiations** (some seven months) was 37,978,000 cubic feet—a two-thirds reduction in the monthly take with the exception of the month of April, 1941. The average monthly allowable for those seven months was 258,278,000 cubic feet (R. 169-170). The deal was closed in June, 1941 (Exhibits Page 87). The average monthly take from Kelly No. 1 for the **succeeding** six months was 251,161,000 cubic feet (R. 110 to 121). The average monthly allowable for that six months period was actually less than it had been for the six

months during the negotiations—250,110,000 (R. 110 to 121). The royalties paid Kelly were reduced accordingly (Exhibits Page 91).

The gas was sweet. It could be used for light and fuel purposes (R. 175). Kelly No. 1 was connected to the defendant's McKee plant at all times. An analysis of the McKee plant operations report filed with the Railroad Commission shows that Shamrock had a market for the full allowable from Kelly No. 1 at all times during the negotiations (Exhibits CC through PP, Exhibits Pages 128 through 157). As an illustration, we take the month of January, 1941, shown as plaintiffs' exhibits EE pages 132-133: Daily intake 214,329,000 cubic feet; Plant used residue daily 8,602,000 cubic feet; leases used 142,000 cubic feet daily. Total legitimate sweet gas uses: 8,602,000 plus 142,000 equals 8,744,000 cubic feet daily. Gas taken daily from the two sweet gas wells was 3,686,000 cubic feet. The Shamrock therefore had an additional use or market for 8,744,000 minus 3,686,000 equals 5,058,000 cubic feet daily. **That market was not supplied until Shamrock began to take the full allowable from Kelly No. 1 in July, 1941.**

It should be noted that the J. B. Schlee well with an allowable of one-third that of Kelly No. 1 was the only other sweet gas well connected to the McKee plant during the negotiations. Although the allowable from the Schlee well was slightly less than one-third that of the Kelly well, Shamrock continued to take almost 3 times the amount of gas from the Schlee well that it took from the Kelly well during the negotiations (Exhibits P through V pages 96 to 109). It should be noted further

that the take from the Schlee well **was not** decreased when the Shamrock started taking the full allowable from Kelly No. 1 in July, 1941, (Exhibits W through M pages 110-119).

Kelly testified that the reduction in the gas take from the well influenced his decision to sell and that if the reduction had not been made he would not have sold the land at all (R. 117).

Your Petitioners were entitled to the instruction on circumstantial evidence. Rea v. Missouri, 21 Lawyers Edition, 707, was reversed for a failure to charge on circumstantial evidence. The court said:

> "To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient but in most cases it is the only proof that can be adduced."

Respondent asserts that "Petitioners say, though, that there was error in the manner in which the trial court submitted their theory of double agency." No. What Petitioners say is that the court did not submit their theory on dual agency in any shape, form or manner. We asked the respondent, Shamrock, to point out to you any portion of the court's charge that it claims instructed the jury on the Plaintiffs' theory of "dual agency." The Respondent has not done so because it is not in the court's charge. The Petitioners alleged "dual agency" in Paragraph IV. of their pleading in this language:

"Plaintiffs further represent that during all of the negotiations and transactions terminating in the sale of the surface and all of H. M. and Mollie Kelly's interest in the oil and gas except a one-sixteenth non-participating oil royalty, C. J. Fowlston was representing them as their agent and at all of the times was also representing the Shamrock Oil & Gas Corporation and acting as the agent and representative of the Shamrock Oil & Gas Corporation. H. M. and Mollie Kelly never at any time knew that C. J. Fowlston was acting as the agent of the Shamrock Oil & Gas Corporation. On the contrary, H. M. and Mollie Kelly were led to believe and did believe that Fowlston was representing H. M. Kelly and H. M. Kelly alone, and did not learn otherwise until early in 1945. They would not have made the trade with the Shamrock had they known Fowlston was acting as the Shamrock's agent in the negotiation terminating in the trade hereinafter stated, all of which was well known to the defendant corporation."

We requested an instruction on "dual agency." It was refused. Petitioners were therefore deprived of the right to have that issue passed upon by a jury of their peers. They have, therefore, been deprived of their property without due process of law.

WHEREFORE, Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Petitioners,

v.

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Respondent.

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To the Honorable, the Supreme Court of the United States:

Respondent, the Shamrock Oil and Gas Corporation, for reply to the petition for writ of certiorari, respectfully shows:

Respondent is unable to accept petitioners' analysis of the record or of the matters involved in this petition for certiorari, and so as this reply proceeds respondent will substitute its own analysis of the record. As the matter now reaches this court, petitioners' contentions have narrowed to two, both relating to the court's charge to the jury, the one that there was error in the trial court's failure to submit to the jury certain instructions relative

to double agency, and the other that there was error in the trial court's failure to instruct the jury that any fact might be proved by circumstances as well as by direct evidence. With respect to the second contention it must be observed that the trial court did quite plainly instruct the jury in this language:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved." (R. p. 283.)

And, since petitioners' entire case hinged upon the alleged agency of one Fowlston for respondent and it was only with respect to this subject of agency that petitioners were fairly entitled to the benefit of an instruction on circumstantial evidence, this complaint is obviously without substance. With respect to both questions it is to be noted that petitioners reserved no exception to any matter actually embraced in the court's charge on the questions now discussed, nor did they by objections point out to the court wherein with respect to these matters they contended that any instruction given was wrong. (R. pp. 286, to 289.) Petitioners thus stand or fall upon their contention that in the refusal of the very instructions requested by them there was material error; and if as applied to this record the requested instructions do not announce correct principles of law or if there be no real reason to believe that a different conclusion of the matter would have been achieved had the requested instructions been given, then the petition lacks substance and should be denied.

In support, therefore, of the judgments below, respondent urges the following points:

RESPONDENT'S FIRST POINT

It is questionable that petitioners made a fact issue entitling them to go to the jury upon the issue of double agency; and, if they did, the jury has resolved that issue against them upon ample evidence and under fair instructions.

RESPONDENT'S SECOND POINT

The trial court would not have been warranted in charging the jury in accordance with petitioners' requests because these authorized a verdict for petitioners without proof of fraud on respondent's part and neither the pleadings nor the evidence warranted a recovery by petitioners save as respondent participated in the fraud charged to it.

RESPONDENT'S THIRD POINT

Save as petitioners established the alleged agency of Fowlston for respondent they were not entitled to recover; and, since the court charged fully on circumstantial evidence as applied to agency, there was no error in the refusal of the additional instruction requested.

Argument under Respondent's First Point

By deed dated June 16, 1941, filed for record June 26, 1941, and recorded in the Moore County Deed Records, Vol. 75, pp. 170, 171, H. M. Kelly and wife, Mollie Kelly, conveyed to respondent all of Survey No. Two hundred thirty eight (238), Block 3-T, T. & N. O. R. R. Company Survey, Moore County, Texas, containing 640 acres of land, more or less. There was reserved to grantors as

royalty the 1/16 part of any oil and casinghead gas produced, this 1/16 interest being further described as being the ½ part of the ⅛ royalty reserved with respect to oil or casinghead gas in the existing or any future lease. (Original Exhibits pp. 87 to 90, R. p. 293.) The price paid was $17,600.00 or $27.50 an acre. The theory of petitioner's suit (R. pp. 6 to 24) was that respondent colluded with petitioners' agent, Fowlston, to acquire the land in question at a grossly inadequate price. The record, however, does not support the contention that the price paid was grossly inadequate. M. G. Mathis, by whom alone petitioners sought to support their view that the surface alone had a reasonable cash market value of from $17.50 to $20.00 an acre and the minerals a value of from $22.50 to $27.50 an acre in June of 1941 (R. pp. 185 to 189), conceded that he made no sales and knew of no sales in the area in question during the year preceding June, 1941, or during the six months following June, 1941. (R. pp. 193, 194.) There was testimony to the contrary that the surface in June of 1941 was worth around $10.00 an acre and the minerals from $15.00 to $20.00 an acre (R. p. 262); it was testified without contradiction that in 1944 W. N. Price purchased the surface at $10.00 per acre and that in previous years he had declined to purchase it at that price (R. p. 269); and by paragraph X of their motion for judgment non obstante veredicto (R. p. 58) petitioners agreed that the court might take the evidence introduced by the respondent with respect to the reasonable cash market value of the surface, namely, $10.00 per acre, as the correct value thereof. Thus for purposes of appeal

petitioners have abandoned their original contention that the sale was at a grossly inadequate price and instead they now contend that, granting that they suffered no actual harm so far as value is concerned, they are still entitled to set aside the transaction because, as they allege, Fowlston acted as the agent of both parties in the transaction and thus there was a concealed double agency entitling petitioners to set aside the transaction without proof of injury.

The record discloses that the deceased Mr. Kelly, a lawyer of long experience (R. pp. 80, 118, 119), had acquired the land in controversy about the year 1918, paying therefor between $5.00 and $8.00 per acre. (R. pp. 120, 121.) When he first purchased the section and for a good many years afterwards it was a grass section only. The section had never been profitable to him, that is, it had never paid him much rent. Had the opportunity ever presented itself to sell the section at an acceptable price he would have done so; but it had not particularly entered his mind that the land could be sold. (R. pp. 122 to 125.) When he sought advice with respect to his Texas lands he went to one C. J. Fowlston, in whom he had confidence. (R. pp. 93, 95.) His first dealings with Fowlston were by correspondence (R. p. 131); and his first personal contact with Mr. Fowlston was when Fowlston visited him in the early part of 1940. (R. pp. 95, 131, 132; Original Exhibits p. 10.) He and his son had utilized Fowlston's services to procure tests by the Railroad Commission of Texas of the gas produced from the well which respondent had drilled on the land in question. (R. pp. 88, 89; Original Exhibits pp. 11 to 16.)

The record further discloses that the particular sale which petitioners now seek to rescind was initiated when Fowlston, acting for Mr. Kelly, approached respondent's president, Mr. Dunn, to determine whether respondent would be interested in the purchase of the gas royalty alone or in the purchase of the interest that was actually purchased. (R. pp. 219 to 221.) Fowlston then corresponded with his principal, Mr. Kelly (R. pp. 165 to 167, 176 to 178); and in May of 1941 Fowlston visited Mr. Kelly in Detroit. (R. pp. 97, 100, 107.) Following this visit, the sale to respondent was actually closed and in such closing Mr. Fowlston continued to act for his principal, Mr. Kelly. (R. pp. 139 to 143, 180.) The sale was in fact closed upon the basis of $17,600.00 and respondent paid that sum to the bank which deposited it to Mr. Kelly's credit. (R. pp. 140 to 142.) Mr. Kelly executed the deed in question before his daughter, Kathryne R. Kelly, who was his own personal secretary, as Notary. (R. p. 143.) Emmett Kelly, the son, bore testimony that he handled the actual closing of the matter, including the mailing to Fowlston of his father's check in the amount of $3,200.00 for commission. (R. pp. 196 to 201.) Fowlston continued to represent Mr. Kelly in subsequent transactions. (R. p. 203.)

Though the record thus discloses that Fowlston represented and was paid a commission of $3,200.00 by Mr. Kelly, it further discloses that on May 9, 1941, respondent issued its check in the amount of $137.61 to Fowlston, covering the expenses of his trip to Detroit in May, and on July 2, 1941, respondent issued its check

to Fowlston in the amount of $500.00, which check supposedly covered his commission. On the issuance of these two checks hinges petitioners' claim of a concealed double agency. The first check, however, lacks the element of concealment because as far back as January of 1941 Fowlston had advised Mr. Kelly by letter that respondent had indicated a willingness to share the expense of any trip he might make to Detroit. (Original Exhibits p. 49.) With respect to the $500.00 check, it was respondent's theory that at no time did it enlist the services of Fowlston to act for it in the transaction, but instead it was led to believe by certain letters written by Mr. Kelly that he required a net deal, that is to say, a deal in which he would be obligated to pay no commission but instead it would be respondent's obligation to pay, in addition to the purchase price, a reasonable commission to Kelly's agent, Fowlston; and that, not being informed by anyone that the complexion of the matter had changed to where Kelly had himself paid a substantial commission out of the purchase price paid him, respondent issued the checks in question in performance of what it considered its obligation to Mr. Kelly, and in no sense was it paying Fowlston for any service rendered for it. Respondent's president, Mr. Dunn, bore testimony that these were the circumstances under which the checks were issued (R. pp. 222 to 224) and that they would not have been issued but for respondent's belief that it was thus obligated to pay Mr. Kelly's commission; further that it was only after this suit was filed that knowledge first came to respondent that instead Mr. Kelly himself had paid a substantial commission. This

positive testimony from Mr. Dunn followed a careful search of respondent's records (R. pp. 225 to 228), based upon which record search Mr. Dunn bore positive testimony that Fowlston had never acted as the agent for respondent in any matter, nor had respondent ever enlisted his services or paid him a commission, but without exception its dealings with Fowlston had been with him as the lease owner or as the representative of land owners selling leases to respondent. (R. pp. 228, 229.) He further testified that on occasion Fowlston had himself sold to respondent leases which he owned and that only in payment for these leases had checks ever been issued by respondent to Fowlston, in which connection respondent tendered its checks for examination by petitioners' counsel. (R. pp. 228, 229.) The record discloses that the foregoing testimony was not controverted. Even so, it might be subject to criticism because of its interested character, were it not for the fact that it finds conclusive support in the record evidence.

On February 21, 1941, Mr. Kelly addressed to Fowlston a letter. (Original Exhibits pp. 55, 56.) This letter does not appear in the printed record but because of its importance it is printed as pages 83 to 85 of respondent's brief as appellee in the Court of Appeals. Petitioners themselves offered in evidence paragraphs 5 and 8 of this letter. (R. p. 176.) The fifth paragraph of the letter reads thus:

> "Now, then, I was not satisfied in the first instance with the offer of $14,400.00, and thought that the Shamrock people should increase this amount. You say they don't wish to do so, and hence I am going to propound another question to you, and that is, *does this*

mean $14,400.00 to me net? Or in other words, will they take care of any fee which you might request, for bringing us together, and would they find the old abstract which I loaned them, and carry it down to date?"

Mr. Kelly wrote a subsequent letter to Mr. Fowlston dated March 14, 1941 (Original Exhibits pp. 61, 62), and because of its importance this letter is likewise printed at pages 86 to 88 of respondent's brief as appellee in the Court of Appeals. Petitioners themselves offered this letter in evidence. (R. p. 177.) It concludes in this language:

"I shall anxiously await the decision of the Shamrock Company, and their letter offering to buy this section under the terms and conditions that I have herein expressed, *and naming their best price net to me.*"

These letters had been actually exhibited to respondent and were its basis for the issuance of the checks in question.

It is the solid foundation thus given respondent's theory by Mr. Kelly's own letters which prompts our question whether petitioners even made a fact issue entitling them to go to the jury upon their theory of double agency. Assuming that such a fact issue was presented, the trial court thus instructed the jury on the subject of agency. Petitioners' theory was presented in this language:

"I give you also the plaintiffs' Requested Instruction Number Nine:

"You are instructed that by agency is meant, a relationship which is based upon a contract, express or implied, of the parties, or created by law, by virtue

of which one party is employed and authorized to act for another. The party so employed is the agent and the one who so employs is the principal. In many instances agency arises not from the use of express language, nor from the existence of a well defined relationship, but from the general conduct of the parties. This relation may exist whether the parties so designate it or not. Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved.

"You are further instructed that where a party acts in behalf of another under the latter's authority and for the latter's benefit, he is, in law, the agent of the latter." (R. pp. 282, 283.)

Respondent's theory was presented in this language:

"In like manner, I give you certain charges requested by the defendant which are adopted by the court as a part of the law of the case. This is defendant's Requested Charge No. Two.

"You are instructed that C. J. Fowlston is to be regarded as the agent of The Shamrock Oil and Gas Corporation only if the plaintiffs have proven, by a preponderance of the evidence, that Shamrock Oil and Gas Corporation employed Fowlston to act for it as its agent in the very matter in controversy, and unless the plaintiffs have so proven, by a preponderance of the evidence, your verdict will be for the defendant.

"I give you also Requested Instruction No. Seven, on this subject:

"You are instructed that Fowlston could become Shamrock's Agent only if Shamrock employed him to act for it. You are further instructed that there was no impropriety in the issuance of the $500.00 check to Fowlston, if, as it states, it was a commission check that Shamrock's office general manager, J. H. Dunn,

authorized, the same not being for any service performed by Fowlston for it, Shamrock, but upon the good faith assumption, however mistaken, that Kelly's sale had been a sale at a net price, and it was Shamrock's obligation to pay a reasonable commission to Kelly's agent; and in such event, Fowlston, if not previously employed by Shamrock to act, did not become Shamrock's agent merely because of the issuance of the $500.00 check." (R. pp. 7, 8.)

It is now conceded that the principles thus stated by the trial judge in his charge to the jury correctly stated the law of Texas on the subject of agency as presented by this record. The Court of Appeals so holds. (R. pp. 297 to 300, 313, 314.) Petitioners so conceded when in the opening paragraph of their brief filed in the Court of Appeals in support of their petition for rehearing they abandoned their contention that they were entitled to judgment non obstante. Further the prior decisions so hold. Since Fowlston was admittedly Mr. Kelly's agent, the circumstance that Mr. Kelly required his commission to be paid by respondent would not change the relationship so as to make Fowlston respondent's agent rather than the agent of Mr. Kelly. *Stevens, et al. v. Karr, 119 Tex. 479, 33 S. W. (2d) 725; C. F. Hughes v. Dundee Mortgage and Trust Company, 140 U. S. 98, 35 L. Ed. 354, 11 S. Ct. 727; Wittenbrock v. Parker, 102 Cal. 93, 36 P. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; 2 C. J. S., Sec. 24b(3).*

If, therefore, the transaction had been actually as respondent understood it to be, namely, that Kelly had bargained for a net price and that it was respondent's responsibility to pay in addition the commission due to

Kelly's agent, the payment of the commission by respondent to Fowlston would have been entirely consistent with an intention to deal with Fowlston as the agent of Kelly only, and the circumstance that respondent paid the commission would not have constituted Fowlston respondent's agent but he would have continued to be the agent of Kelly solely. As the record now develops, of course, Kelly paid his own commission, though, peculiarly enough and consistent entirely with the original theory of a net transaction, he paid as commission the full difference between respondent's original figure of $14,400.00 and the final figure of $17,600.00; and there came from Mr. Kelly's own file (R. pp. 135 to 137, defendant's Exhibit 103, Original Exhibits p. 158) an instrument indicative that when Fowlston and Mr. Kelly were together in Detroit there was at least some discussion that Fowlston would receive whatever respondent paid above $14,400.00. The record, though, makes it quite clear that respondent did not know of this but instead respondent knew only that Mr. Kelly had inquired whether respondent would pay the commission and whether the price to be paid by respondent was a price net to him. The Texas courts recognize the principle of apparent authority, that is to say, that when a principal has placed an agent in such situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is led to believe that the agent has authority to perform acts usually done in a business of that kind, one dealing with the agent is justified in presuming such authority to have been given, or, stated otherwise, a principal is equally bound by the authority

which he actually gives and by that which by his own act he appears to give. See *Tex. Jur., Vol. 2, pp. 425, 426, Sec. 39*, and cases cited. The rule is said to be an application to the law of agency of the principles of estoppel which, as far back as the case of *Love v. Barber, 17 Tex. 312, 318*, were thus stated:

> "Likewise the Texas courts recognize the principle that where one of two equally innocent parties must suffer by reason of the fraud of another, the loss should fall upon him whose negligent act or omission has enabled the wrongdoer to commit the fraud." *Morgan v. Harper, Tex. Com. App., opinion approved, 236 S. W. 31, 73; 20 Tex. Jur. pp. 100, 101, sec. 65.*

Here Mr. Kelly by his own letters led respondent to the belief that it was dealing with him on a net basis to where it was its obligation to pay the commission fairly due his agent in addition to the purchase price, and, having by his letters induced Shamrock to accept and act upon that view, petitioners ought not now to be heard to say that a different state of facts actually existed and that a net transaction was not within the contemplation of the parties, or at least respondent ought not be charged with having paid a secret commission or with having given to Kelly's agent, Fowlston, a gratuity in the nature of a bribe as an inducement to Fowlston for entering into contractual relations on behalf of his principal, Kelly.

If there was an issue of fact to go to a jury, the jury was clearly and correctly instructed with respect to what would constitute Fowlston the agent of respondent and with respect to what would not constitute Fowlston the agent of respondent.

Argument under Respondent's Second Point

Petitioners say, though, that there was error in the manner in which the trial court submitted their theory of double agency. Here again we note that petitioners did not by any character of objection direct the attention of the trial judge to any supposed inaccuracy in any matter actually embraced in the court's charge on the subject of agency. (R. pp. 287 to 289.) Therefore the question now presented to the court is necessarily limited to whether there was error in the refusal of such instructions as were requested by petitioners.

Petitioners' contention is that there was error in refusing its Requests Nos. 2 and 10. (R. pp. 42, 49.) Request No. 2 (R. p. 42) instructed the jury to return a verdict for petitioners if the relation of principal and agent existed between Fowlston and respondent from January to June, 1941, without the knowledge of Mr. Kelly. Request No. 10 (R. p. 49) was in substance the same, with the addition that it was not necessary that either Fowlston or respondent intended any fraud or injury to Mr. Kelly but, even though they were innocent in the matter, petitioners would still be entitled to rescission. In contending that these instructions should have been given, petitioners rely upon the rule announced in *Olsen v. Pettibone, Minn. Supp., 210 N. W. 149, 48 A. L. R. 913*, in substance that, where the agent undertakes to act for both parties, the transaction may be rescinded by the one ignorant of the double employment without a showing of injury or intent to deceive. Under this holding petitioners insist that even though

respondent was perfectly innocent in the transaction the deed could still be subject to rescission.

Neither the pleadings nor the evidence, however, render this principle applicable to the present record; and under this record no instruction would have been authorized which would warrant a recovery by petitioners save as it was established that respondent participated in or was a party to the alleged fraud. This suit was not founded on any theory that, though both parties were innocent in the transaction, yet Fowlston had acted for both and therefore the transaction was voidable at the option of whichever of them did not know of the double agency. Instead what petitioners alleged was that prior to December 1, 1940, respondent conceived the fraudulent scheme of inducing the Kellys to part with the title to their land at a grossly inadequate price, that to accomplish this purpose respondent enlisted the services of Kelly's own agent, Fowlston, inducing him to turn against his own principal, that at the behest of respondent Fowlston made to Mr. Kelly a succession of false representations, and respondent, as its part of the scheme, was guilty of other fraudulent conduct, and that it was Mr. Kelly's reliance on what was told him pursuant to this fraudulent combination which brought about the sale and which now entitled petitioners to rescission. (R. pp. 8 to 22.) Without attempting any extended analysis of the evidence, it suffices to say that petitioners attempted to prove what they alleged, that the court extended petitioners wide latitude in the matter of proving all that Fowlston said to Mr. Kelly as inducement, and that by his charge the trial judge authorized the jury to

consider as against respondent what Fowlston said to Kelly, but only in the event the jury first found that petitioners had established the alleged agency of Fowlston for respondent. (R. pp. 281, 282.) Certainly on such a record the Court of Appeals was correct in its holding that only as fraud on respondent's part was proven could there be a recovery (R. p. 299), and therefore on this record there can be no error in the refusal of any instruction which predicates a right of recovery on any theory save the theory of fraud which petitioners have pleaded and attempted to prove. With respect to that theory the charge of the trial judge clearly authorizes a verdict for petitioners if the jury finds the facts to be as petitioners have alleged them to be. (R. pp. 280 to 283.)

Had the pleaded theory of petitioners' case been otherwise, the instructions in question would still have been correctly refused because they ignored the question of ratification. Double agency does not render the contract procured thereby void; the principle affected thereby may ratify the same; at most there results a personal right to rescind which must be exercised within a reasonable time or is lost. This statement finds support in the cases listed on pages *927 and 928 of 48 A. L. R.*, being a part of the annotation following the case of *Olsen v. Pettibone, Minn. Sup., 210 N. W. 149, 48 A. L. R. 913.* In the case of *United States v. Grace Evangelical Church of South Providence Ridge, 7 Cir., 132 F. (2d) 460, 462*, the principle is thus stated:

> "Likewise if either principal, upon learning of the true situation after the transaction has been thus

brought about, ratifies the dual representation the transaction is no longer voidable by him. Section 1532. And unless the principal rescinds within a reasonable time after learning the true situation he is presumed to ratify. Fitzgerald v. Union Central L. Ins. Co., 8 Cir., 42 F. (2d) 76, certiorari denied 282 U. S. 838, 51 S. Ct. 38, 75 L. Ed. 744." [Quotation from *132 F. (2d) 462.*]

It may further be said that the cases uniformly hold that petitioners are entitled to complain of the court's charge only with respect to those matters as to which by specific objection they fairly made known to the trial court the particulars in which they contended the charge to be in error. *Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c; Palmer v. Hoofman, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, 144 A. L. R. 719; Hall v. Aetna Life Ins. Co., 8 Cir., 85 F. (2d) 447, 451; Thiel v. Southern Pacific Company, 9 Cir., 149 F. (2d) 783, Syllabi 17, reversed on other grounds, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412; Home Ins. Co. of New York v. Tydal Company, et al., 5 Cir., 152 F. (2d) 309, rehearing denied 157 F. (2d) 851.*

Further the objections as to the failure to charge are tenable only as to the specific written requests denied. *Home Insurance Company of New York v. Tydal Company, et al., 5 Cir., 152 Fed. (2d) 309, 310.*

Considering the wide latitude allowed petitioners in the development of their case, we submit most respectfully that

petitioners were given full opportunity to develop their case, and that so far as petitioners are concerned there occurred on the trial below nothing inconsistent with substantial justice entitling petitioners to a new trial. *Maryland Casualty Company v. Reed, 5 Cir., 76 F. (2d) 30; Dallas Railway and Terminal Company v. Sullivan, 5 Cir., 108 F. (2d) 581.*

Argument under Respondent's Third Point

Petitioners' final contention finds sufficient answer in the preceding pages of this reply. The complaint is that the trial court erred in refusing petitioners' Request No. 11 (R. p. 38), by which petitioners sought to have the jury instructed that any fact might be proved by circumstance as well as by direct evidence. The fraud which petitioners sought to prove was predicated entirely on their claim of agency, that is to say, that respondent, with knowledge that Fowlston was Mr. Kelly's trusted agent, enlisted him as its own agent to defraud his principal. On this contention the trial court expressly gave the petitioners the benefit of the circumstantial evidence rule in this language:

> "Agency may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter involved." (R. p. 283.)

It seems settled that failure to charge, in the precise words requested, a principle clearly stated in the charge given to the jury is not error. *Lemley v. Christophersen, 5 Cir., 150 F. (2d) 291.*

CONCLUSION

Respondent submits most respectfully that on this record judgment was correctly entered in favor of respondent, that petitioners have wholly failed to demonstrate wherein there was error in any ruling of the courts below or wherein any alleged inaccuracy in the charge below has so operated to petitioners' prejudice as to require that the judgments below be set aside and a new trial granted. Respondent therefore submits most respectfully that the petition for certiorari should be denied. It is here certified that before this reply was filed copy thereof was duly served upon petitioners' counsel.

Respectfully submitted,

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FILE COPY

Supreme Court of The United States

TERM: A. D. 1949

No. 719

Lawrence E. Kelly, Administrator of the Estate of H. M. Kelly, Deceased, and Mollie Kelly,
Petitioners

v.

The Shamrock Oil & Gas Corporation,
Respondent.

PETITIONER'S MOTION FOR REHEARING

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PETITIONER'S MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Petitioners, Lawrence E. Kelly, administrator of the Estate of H. M. Kelly, deceased, and Mollie Kelly, respectfully request that the Court set aside its order denying their Petition for a Writ of Certiorari in this cause and grant their petition for the following reasons:

The petitioners based their right to cancel the mineral deed in question upon two distinct theories:

(1) Numerous fraudulent representations made by one C. J. Fowlston while acting as the agent of the defendant; and (2) a secret relationship agency existing between the defendant Shamrock and C. J. Fowlston unknown to H. M. Kelly. In submitting the petitioner's case on fraudulent representations, the court instructed the jury on the law, with respect to the facts necessary to establish "agency", but the court did not instruct the jury on the question of "dual agency" unknown to one of the principals. In other words, the jury was not instructed that if Fowlston was acting as the agent of the Shamrock unknown to H. M. Kelly, then and in that event the Plaintiffs were entitled to a verdict. It was admitted that Fowlston was Kelly's agent.

After summarizing the evidence in this case on "dual agency unknown to H. M. Kelly, the seller," the Circuit Court held that "this evidence made a jury issue on this point" (R. 299). We asked counsel for respondent to point out to you any portion of the court's charge instructing the jury that the plaintiffs were entitled to a verdict if Fowlston was acting as the agent of the Shamrock unknown to Kelly. The respondent did not do so. The Circuit Court of

Appeals did not point it out in their opinion. The reason it was not done is that the trial court did not instruct the jury on that phase of plaintiff's right to a verdict. The petitioners have been caught in this situation: The trial court did not instruct the jury on "dual agency unknown to one of the principals" because he was not familiar with the law. The Circuit Court of Appeals held that the question of secret dual agency had been submitted.

Following the petitioner's motion for a rehearing in the Circuit Court, that court wrote a supplemental opinion in which it stated: "We are of opinion that the issue of concealed double agency was adequately submitted" (R 313-314). The court did not say how it was submitted, however. A jury cannot be presumed to know that if Fowlston (Kelly's admitted agent) was also acting as the agent of the Shamrock unknown to Kelly, the plaintiffs were entitled to a verdict.

As this Court said in St. Paul F. & M. Ins. Co. v. Bachmann, 76 L. Ed. 653:

> "The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first."

The instructions requested by petitioners were correct. No one has ever pointed out a single erroneous statement of the law in those requested instructions.

"The rule that a sale made by an agent may be set aside by the principal where the purchaser has paid the agent a secret commission is obviously one of public policy, and the reason for it is plain." Dockstader v. Brown, 204 SW. 2d 356 (Texas Court of Civil Appeals, paragraph 5). When it is shown that a commission was paid unknown to the principal, the right to rescind does not depend upon injury, fraud, or wrongful intent. "This right it might exercise without regard to any actual injury it had sustained and without regard to the effect of the allowance of the commission upon the integrity of its agent." City of Findlay vs. Pertz, 66 Fed. 436.

In this case the Circuit Court of Appeals held that the evidence raised the question of dual agency unknown to Kelly, the seller. Fraud is not an element of the right to rescind in a case of double agency unknown to one of the principals. In submitting the plaintiff's contentions regarding fraudulent representations, the court did not submit "dual agency unknown to the seller."

"However, when it comes to a case of double agency, the principal who did not know that the agent in his employ was also the agent of the other party to the contract has the absolute right to repudiate the transaction upon the discovery of the truth - So, as a matter of public policy, it is generally held that a deal conducted wholly or in part by an agent of one of the parties who at the same time acted for the opposite party may be rescinded by the one ignorant of the double employment without showing any injury or intent to deceive. Rescission is his absolute right." Olson v. Pettibone, 48 A. L. R. 915. Idem: Kansas Life Ins. Co. v. First Bank of Truscott, 78 S. W. 2d 585 (Texas Commission, Pgh. 2); 2 A. J., Agency, Sec. 265; Newton v. Mann, 147 A. L. R. 769, Pghs. 6 and 7.

> "If, without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either." Restatement of the Law, Agency, Section 313.
>
> "And it makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith. The double agency is a fraud upon the principal in such case, contravenes public

policy, and the Courts will refuse to enforce a contract growing out of such agency or award damages for its breach." Bass v. Tolbert, 112 S. W. 1078 (Texas C. C. A.).

The petitioners asked the Court to instruct the jury that if they found that the relation of principal and agent existed between Fowlston and the Shamrock during the negotiation period and if they further found that H. M. Kelly did not know that Fowlston was the agent of the Shamrock, that the jury should return a verdict for the plaintiffs. (R. 32, request No. 2). The instruction was refused. There is no instruction anywhere in the Court's charge informing the jury of the law applicable to a double agency unknown to one of the principals. That fact is made evident in petitioners' brief in support of their Petition for Writ of Certiorari beginning on page 11, where the Court's charge is set out in its entirety.

One of the plaintiffs' theories entitling them to recover if the jury found the facts in plaintiffs' favor has not been submitted to the fact-finding body in any shape, form or fashion. In New York Central Railroad Company v. Edward H. Johnson, No. 456, you granted a petition for writ of error saying: "But the argument is to be limited to the question whether the

alleged misconduct of counsel for the plaintiffs in their arguments to the jury was so unfairly prejudicial to the defendant as to justify a new trial." 73 L. Ed. 523. Obviously that was a much weaker situation than the one now before the court. This petition should be granted and argument limited to the question of whether or not the court erred in refusing to instruct the jury on secret double agency and the question of whether or not the court submitted the issue of "dual agency unknown to the seller, H. M. Kelly, to the jury."

WHEREFORE, petitioners pray that the order denying a writ of certiorari be vacated and their petition granted.

Respectfully Submitted,

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and

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CERTIFICATE OF COUNSEL

I, Albert Smith, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay. A copy of this petition was served upon Mr. R. A. Wilson, counsel for respondents, on this 15 day of June, 1949.

Albert Smith

Counsel for Petitioners